IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The stated grounds of the appellees' Motion to Dismiss or Affirm (hereinafter "Motion") is that the various Federal questions presented by New Mexico's Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") are so insubstantial as not to warrant further consideration. The Motion supports this conclusion, however, only by rewriting §2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391, by misstating its legislative history, by ignoring the Energy Tax' dis-

criminatory treatment of wholesale sales of electricity, and by requesting this Court's summary approval of a hypothetical tax which New Mexico might have, but concededly did not, enact. The Federal questions presented by the actual Energy Tax are clearly substantial, and have been resolved by the Supreme Court of New Mexico in a fashion inconsistent with this Court's prior teachings:

1. Appellees concede the novelty of the question whether imposition of the Energy Tax is forbidden by §2121(a) of the Tax Reform Act, 15 U.S.C. §391 (hereinafter "§391"), but contend that it is easily resolved in their favor. The substance of this argument is that New Mexico's tax structure, viewed as a whole, does not discriminate against electricity generated in New Mexico and transmitted to and consumed in other states. This ignores the patent discrimination of New Mexico's tax structure against producers of electrical energy which is wholesaled for eventual consumption outside New Mexico.

As was noted in the Jurisdictional Statement, New Mexico's Gross Receipts Tax Act, §§72-16A-1, *et seq.*, NMSA 1953, applies with virtual uniformity to most *retail* sales of electricity in New Mexico, but does not apply at all to *wholesale* transactions. At the wholesale level, there is *no* New Mexico tax imposed on locally-consumed energy, because the "assigned credit" of §9(C) of the Energy Tax will wholly abate any liability

for that levy, and the Gross Receipts Tax is by its very terms inapplicable.[1]

More importantly, the argument requires the addition to §391 of critical language which Congress never enacted, in order to derive a test of discrimination which Congress never intended. Section 391 must be interpreted according to the plain meaning of its text.[2] That text speaks of "*a tax* on or with respect to the generation or transmission of electricity," not *all taxes* or the *total tax structure*. The language "or indirectly" in §391 does not suggest any different test of discrimination; it merely indicates that Congress meant to forbid discriminatory burdens imposed through indirection, such as by the credit provisions of the Energy Tax. In short, Congress legislated to forbid the imposition of any single State tax on or with re-

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[1] Appellees assert that the Energy Tax is even-handed, because it is *paid* by every generator of electricity. (Motion, pp. 4, 8). That is simply not the case. Under the Regulations issued originally by the Commissioner of Revenue (Jurisdictional Statement, Appendix E), generators of electricity to be consumed in New Mexico receive an immediate "potential" credit which will eventually expunge all Energy Tax liability.

[2] At the very most, appellees' statutory argument indicates a minor degree of ambiguity in the language of §391. In the face of such ambiguity, it becomes the task of this Court to construe the statute in a fashion which best effectuates the intent of Congress:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. *United States v. American Trucking Assoc.*, 310 U.S. 534, *reh'g. denied*, 311 U.S. 724 (1940).

Accord, United States v. Alpers, 338 U.S. 680, 681-82 (1950); *United States v. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942); *Haggar Co. v. Helvering*, 307 U.S. 389, 394 (1940).

spect to the generation or transmission of electricity which is in fact discriminatory against interstate transactions. The Energy Tax is clearly subject to that prohibition.[3]

Appellees' treatment of §391's legislative history similarly misses the mark. Initially, appellees contend that the legislative history discussed in the Jurisdictional Statement concerns a separate bill which was only made part of the Tax Reform Act when the latter reached the House-Senate Conference Committee. That is simply erroneous. The legislative history cited in the Jurisdictional Statement is solely that of the Tax Reform Act, and the provision that was to become §391 was part of that bill well prior to the Report of

[3] Appellees also interject the argument that §391 reaches only discriminatory taxes on "electricity generated . . . in interstate commerce" and is thus inapplicable, because all electricity is generated in intrastate commerce. (Motion, p. 13). That is simply not what the statute says. The statutory definition of a discriminatory tax refers to "electricity which is generated *and transmitted* in interstate commerce." 15 U.S.C. §391 (emphasis added). The transmission of electricity for consumption outside New Mexico clearly occurs in interstate commerce. *Fed'l. Power Comm'n. v. Florida Power & Light Co.*, 404 U.S. 453, *reh'g. denied*, 405 U.S. 948 (1972). The point is that appellees can sustain the Energy Tax only by adding or deleting unenacted language to §391.

the Senate Finance Committee. S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976).[4]

Appellees effectively concede that the provision in question, as reported by the Finance Committee and passed by the Senate, was intended to and did invalidate the Energy Tax. Appellees rely instead upon a presumed transformation of Congressional intent, supposedly evidenced by a minor language substitution made by the Conference Committee. That Committee, as noted in the Jurisdictional Statement, did change the words "higher gross or net tax" in the Senate version, to "greater tax burden", the formulation eventually enacted. There is certainly nothing in the language selected by the Conference Committee which signifies a departure from the meaning or intent of the Senate-passed bill. There are no legislative materials to support appellees' claim of a radical alteration of legislative purpose. Quite to the contrary, the Report of the Conference Committee unequivocally states that its version "follows the Senate

[4] Appellees also attempt to rely upon a letter from counsel for one of the appellants to support certain gratuitous assertions concerning the derivation of §391. If nothing else, the correspondence in question confirms that §391 has always been intended to reach the Energy Tax. Appellees overlook the fact, however, that the letter was generated long before passage of the bill *by the Senate* and can have no bearing whatsoever on proceedings in the Conference Committee. More significantly, simple logic indicates that the process of statutory construction, which has as its purpose the identification of the legislative body's intent, should only take into account materials considered by the legislative body as a whole. Materials so far removed from the mainstream of the legislative process are irrelevant to a determination of Congressional intent.

amendment" and presumably its intent as well. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, as reported in 1976 U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503.

Appellees also attempt to argue that §391 was not meant to apply to what is in effect a reduction of New Mexico's sales tax. (Motion, pp. 13, 15). That is not, however, the legislation New Mexico enacted. This Court cannot rule on hypothetical taxes:

> We can only consider the legislation that has been had, and determine whether or not its necessary operation results in an unjust discrimination between the parties charged with its burdens. *Travelers Ins. Co. v. Connecticut*, 185 U.S. 364, 371 (1902).

Cf. also, McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 563 (1935). The Energy Tax, as enacted, imposes a greater tax burden on electricity sold at wholesale and transmitted in interstate commerce and violates the plain language of §391.

Finally, the contention is made that §391, if found applicable to the Energy Tax, is itself unconsitutional. Legislation such as §391 has repeatedly been found within Congress' delegated powers. *Cf. Heublein v. So. Carolina Tax Comm'n.*, 409 U.S. 275 (1972); *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Hill v. Florida*, 325 U.S. 538 (1945). Appellees' arguments are simply insufficient to satisfy the burden of rebutting the strong presumption of validity that attaches to an Act of Congress. *Cf. e.g., United States v. Nat'l. Dairy Products Corp.*, 372 U.S. 29 (1963); *Helvering v. Davis*,

301 U.S. 619 (1937); *United States v. Butler*, 299 U.S. 1 (1936). By putting in issue the constitutionality of a Federal statute, appellees have merely confirmed the significance of the Federal questions presented and the need for plenary consideration.

2. Appellees initially attempt to mask the discrimination of the Energy Tax against interstate transactions at the wholesale level by arguing that the generation of electricity is a separate local activity, relying principally upon *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932). The *Pfost* decision, as well as other decisions of this Court concerning severance or production taxes (see Jurisdictional Statement, p. 20), holds only that a production tax uniformly applied does not offend the Commerce Clause. That proposition is irrelevant here, where the tax is imposed *only* if the goods produced (electricity) are marketed and consumed outside New Mexico.

Recognizing this difficulty, appellees argue that the Energy Tax is in fact on the commodity of electricity and that inquiry must be made of New Mexico's total tax structure with respect to electricity to ascertain whether the Energy Tax is discriminatory. That inquiry is of no assistance to appellees' position. Analysis of New Mexico's total tax structure reveals that a wholesale sale of electricity for local consumption is subject to no tax whatsoever, while a wholesaler of electricity for consumption in other states must pay the Energy Tax. That is clearly discriminatory and violates the rule of equal treatment announced in *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

Appellees cannot, and do not, dispute that the Energy Tax discriminates against interstate transactions at the wholesale level. In response, they can only state that: "It is hard to see why special significance is attached to wholesale transactions." (Motion, p. 9). The record, however, shows that the wholesaling of electricity is a separate and significant sphere of economic activity for appellants and their New Mexico utility competitors. New Mexico simply cannot be heard to contend that the wholesaling of electricity is of no importance. After all, the elaborate credit assignment-reimbursement mechanism created by §9 (C) of the Act was designed to insure that locally-consumed electricity did not incur any Energy Tax liability at the wholesale level. Even were the argument available to New Mexico, there is no *de minimis* defense to violations of the Commerce Clause.

The result in *Public Utility Dist. No. 2 v. State*, 82 Wash. 2d 232, 510 P.2d 206 (1973), *appeal dismissed*, 414 U.S. 1106 (1974) is not to the contrary. There, several Washington utilities contended that Washington's gross income tax could not properly be applied to income from the sale of power to certain Oregon utilities. The tax in question permitted deductions from sales in interstate commerce and for wholesale sales for resale in Washington. The latter deduction was to avoid "pyramiding" with the state's retail tax on electricity and was held not arbitrary. A similar deduction was available for interstate sales, so there was no issue of discrimination against interstate commerce.

As for the sales which had been taxed in that case, it was established that both the sale and the delivery of the power in question had taken place in Washington. Interstate commerce was not involved. *Public Utility Dist. No. 2* simply holds that a state may properly tax the sale of power which is generated, sold and delivered within its borders. That has no bearing on the present case. The Energy Tax concededly discriminates against interstate transactions in electricity at the wholesale level. No case cited by appellees sustains such clear discrimination, or holds that the constitutional question thereby presented is insubstantial.

3. Appellees are understandably ambivalent in their characterizations of the Energy Tax. The Act's concededly discriminatory impact is defended by arguing that the tax is on the commodity of electricity, and that the State's entire taxing structure for that commodity is non-discriminatory. When this is shown to result in multiple taxation of a good transmitted in interstate commerce, the Energy Tax is defended as one on the activity of generation, which is localized and can only be taxed by New Mexico. The inconsistency of the State's position is apparent.

In its practical operation, the Energy Tax is not a production tax on the generation of electricity. Moreover, its burden falls solely upon electricity transmitted in interstate commerce, which the record amply demonstrates is subject to additional taxation in the states where it is eventually consumed. Such multiple taxation of interstate commerce clearly presents a significant Federal question. *Gen'l. Motors Corp. v. Washington*, 377 U.S. 436 (1964).

4. Appellees do not dispute that the stated purpose and necessary effect of the Energy Tax was to collect tax revenues solely from persons residing outside the State of New Mexico. They argue only that the Energy Tax should not be invalidated on the basis of the motivations of the enacting body. The argument misses the point.

The impact of the Energy Tax does in fact fall entirely outside the borders of New Mexico. Its legislative history merely serves to confirm that this comports with the intention of the New Mexico legislature. Obviously, the intention of the enacting body is pertinent to whether the Energy Tax discriminates against producers which wholesale energy for consumption outside the State. In *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), this Court considered statements issued by the President of the New York Stock Exchange and the Governor of New York in confirming its conclusions as to the discriminatory nature of the New York tax involved. 429 U.S. at 323, 327, fn. 7, 10.

By quibbling over the pertinence of the legislative history of the Energy Tax, appellees tacitly recognize that its impact has been accurately described. Its burden falls entirely on residents of other states, and such an exaction exceeds New Mexico's taxing powers.

CONCLUSION

The parties understandabiy differ as to the appropriate resolution of the issues presented by the Energy Tax. It does not follow, however, that these Federal questions are so insubstantial that summary dismissal is justified, and appellees have not justified such a

disposition. The Motion to Dismiss or Affirm should be denied, and the issues set forth in the Jurisdictional Statement should be granted plenary consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

DANIEL J. McAULIFFE, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellants herein, Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tuscon Gas & Electric Company.

2. That the Brief In Opposition To Motion To Dismiss Or Affirm submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, this 18th day of September, 1978, to:

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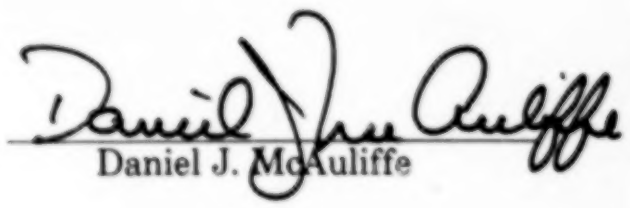
3. That the foregoing represents service on all parties required to be served under the provisions of Rule 33, Rules of the United States Supreme Court.



Daniel J. McAuliffe